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No. 04-905

IN THE
Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF PUPIL TRANSPORTATION SERVICES IN SUPPORT OF PETITIONER

THOMAS W. RHODES
Counsel of Record
RACHEL D. KING
SMITH, GAMBRELL & RUSSELL, LLP
Promenade II, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 815-3500

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF PUPIL TRANSPORTATION SERVICES IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of the Supreme Court of the Unites States, the National Association of State Directors of Pupil Transportation Services (the "Association") respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of Petitioner. Petitioner has consented to the filing of this brief, and Petitioner's letter of consent has been lodged with the Clerk of the Court. Respondent declined to consent.

The Association is a nonprofit organization that represents the interests of a diverse cross section of individuals and organizations involved in the transportation of the Nation's school children. The Association's members include state and local directors with the primary responsibility for school transportation. Specifically, the Association's members are responsible for purchasing the school buses that transport children to school and to school-related activities.

The Association seeks leave to file a brief as *Amicus Curiae* because the Association believes the attached brief may bring to the Court's attention a relevant matter not brought to its attention by the parties. The Association's members include consumers directly affected by the Circuit Court's decision; the effect of the Circuit Court's decision on consumers merits consideration.

The Circuit Court's decision will impair the ability of its members to purchase school buses. State and local governments purchase school buses through a competitive-bidding process, in which manufacturers and distributors offer selective discounts and "concessions" much like the concessions at issue in this case. The Circuit Court's decision will discourage school-bus manufacturers and distributors from offering such concessions. Fewer concessions and fewer discounts will mean higher prices for the state and local governments that buy school buses. Higher prices will likely mean fewer new buses purchased.

The Association respectfully requests that the Court grant it leave to file the attached brief as *Amicus Curiae* to share that viewpoint about the case at bar.

Respectfully submitted,

THOMAS W. RHODES
Counsel of Record
RACHEL D. KING
SMITH, GAMBRELL & RUSSELL, LLP
Promenade II, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 815-3500

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BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF PUPIL TRANSPORTATION SERVICES IN SUPPORT OF PETITIONER

Interest of the *Amicus Curiae*

Amicus Curiae,[1] the National Association of State Directors of Pupil Transportation Services, represents the

[1] Pursuant to Rule 37.6, counsel for *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and no person other than *Amicus Curiae*, its members, members of its affiliated councils and its counsel made a monetary contribution to the brief's preparation or submission.

interests of a diverse cross section of individuals and organizations involved in the transportation of the Nation's school children. The Association's members include state and local directors with the primary responsibility for school transportation.[2] The Association is a nonprofit organization headquartered in Virginia.

The Association's members are responsible for transporting the Nation's school children on school buses. State and local governments spend more than $8.4 billion per year on school transportation.[3] Those governments buy school buses through a competitive-bidding process. "Concessions" offered by school-bus manufacturers to their local distributors play an important part in that process. In a "concession" program, school-bus manufacturers selectively discount the wholesale cost of buses offered by distributors to fulfill such competitive bids. The Circuit Court's decision will discourage such discounting and impair the ability of school-bus buyers to receive lower prices, resulting in fewer new buses purchased.

Summary of the Argument

The Circuit Court's decision will discourage school-bus manufacturers and distributors from offering "concessions" and selective discounts to local and state governments, the primary purchasers of school buses.

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2 School-bus manufacturers, equipment suppliers, and a number of state associations whose members include school transportation officials, drivers, trainers and mechanics are also members of affiliated councils within the Association.

3 *School Transportation News*, 2004 State and Provincial Directors of Pupil Transportation Survey.

Fewer discounts and concessions will seriously impair the ability of local and state governments to purchase new school buses. The effect of the Circuit Court's decision on school transportation militates in favor of review.

Argument

The Circuit Court's Decision Will Impair The Ability Of State And Local Governments To Buy Their School Buses At Lower Prices

The Nation's school transportation system relies largely on school buses. On the average day, more than 25 million school children ride public school buses to and from school. They ride in a fleet of some 450,000 school buses that travel a cumulative total of more than 313 billion passenger-miles per year.[4] That adds up to some 10 billion student trips per year on school buses.

Federal, state and local governments have naturally invested substantial efforts in assuring the safety and efficiency of that school-bus fleet. Most notably, the Department of Transportation's regulations

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4 NAT'L ACADEMY OF SCIENCE, TRANSP. RESEARCH BD. OF THE NAT'L ACADEMIES, Special Report 269, *The Relative Risks of School Travel: A National Perspective and Guidance for Local Community Risk Assessment*, 4 (2002).

detail extensive requirements for school-bus safety.[5] State governments also typically publish further highly detailed specifications for school buses, often extending more than a hundred pages.

The safety of its school-bus fleet has been one of the Nation's success stories. School-bus transportation is the safest form of school transportation in the United States.[6] An important part of that safety record has come from school districts' systematically retiring older buses and acquiring newer buses that comply with updated specifications and safety standards.

Three major manufacturers make most of the Nation's school-bus fleet. Laws in most states require the manufacturers to sell those buses through local distributors. A school-bus manufacturer typically will

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[5] The Federal Motor Vehicle Safety Standards adopted by the National Highway Traffic Safety Administration appear at 49 C.F.R. § 571. A number of sections in that regulation address special issues relating to school buses, including school bus pedestrian safety devices (49 C.F.R. § 571.131), school bus rollover protection (49 C.F.R. § 571.220), school bus body joint strength (49 C.F.R. § 571.221) and school bus passenger seating and crash protection (49 C.F.R. § 571.222). Most of the 611 pages of the motor vehicle safety standards and testing procedures also apply to school buses.

[6] For the school years 1991-1999, school buses represented 25 percent of the miles traveled by students during normal school travel hours but accounted for less than 4 percent of injuries and only 2 percent of fatalities. NAT'L ACADEMY OF SCIENCE, TRANSP. RESEARCH BD. OF THE NAT'L ACADEMIES, Special Report 269, *The Relative Risks of School Travel: A National Perspective and Guidance for Local Community Risk Assessment*, 5 (2002).

appoint a distributor to cover a specific state or several states as the distributor's area of primary responsibility. School-bus distributors do, however, sell outside their territories from time to time.

The buyers of school buses purchase their fleets with tax revenues. They buy the overwhelming majority of school buses through competitive bidding.

In the competitive-bidding scheme, a very large percentage of school buses is sold on a "concession" basis. In such a transaction, the school-bus manufacturer determines that it will grant the distributor a concession off the wholesale price to allow the distributor to compete more effectively for a specific bid.

Such concessions allow school-bus buyers to receive the benefit of selective discounts. Where a manufacturer believes that it must lower its price to enable its Distributor A to "get the business" in a particular bid, the manufacturer grants a concession that might not be available to other distributors, such as Distributor B from another state that is not seeking that bid. (Of course, Distributor B will likely get its own selective concessions for other bids – including bids that Distributor A will not be competing for.)

The Circuit Court's ruling in this case discourages such discounting. Under the rule in that opinion, the manufacturer who offers the concession to Distributor A may have to pay damages to Distributor B, even though Distributor B had no interest in the transaction and did

not bid.[7] Where school-bus manufacturers are discouraged from discounting, school-bus buyers suffer.

The Association's perception of the likely effect of the Circuit Court's opinion on school-bus purchasing comports with the teaching of antitrust economics. If the cost of providing a selective discount is treble damages and attorneys' fees, the manufacturer will most likely forego the selective discount. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 269, ¶ 721e (2d ed. 2002) (manufacturer forbidden to discount will "[m]ore ~~likely~~ ~~forego~~ sales, causing some customers "to pay higher prices").

The tax revenues for school-bus purchases are limited. Faced with higher prices, some school-bus purchasers each year will inevitably have to buy fewer new buses to replace older ones.[8]

The Association respectfully suggests to the Court that this is not just a commercial issue between manufacturers and dealers. However commendable – or

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[7] The Circuit Court held that once the truck dealer showed that it had actually bought some trucks from the manufacturer, the dealer could include in its damage base transactions in another state that it did not even bid on. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 705-706, 714 (8th Cir. 2004).

[8] If school buses become more expensive and school-bus purchasers buy fewer new buses to replace older buses, new protection features in new school buses cannot be afforded to all riders. Additionally, higher bus prices will keep older, less efficient and less environmentally friendly buses in use longer.

debatable – the policy may be of protecting middlemen under the Robinson-Patman Act, that policy has an effect on consumers, whose interests are often overlooked. Here, the Circuit Court's unprecedented extension of the Robinson-Patman Act will affect an important class of consumers. We respectfully urge that the effect of the Circuit Court's opinion on an important part of our Nation's school-transportation system militates strongly for review.

Conclusion

The Petition for a Writ of Certiorari should be granted.

THOMAS W. RHODES
Counsel of Record
RACHEL D. KING
SMITH, GAMBRELL & RUSSELL, LLP
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1230 Peachtree Street, N.E.
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